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Intersec Interactive, Inc.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Case No. cv-15-01145 DMR

**DEFENDANT'S REPLY BRIEF  
IN SUPPORT OF  
MOTION TO DISMISS AND/OR TRANSFER  
VENUE**

**DATE: June 11, 2015  
TIME: 11:00 a.m.  
PLACE: Courtroom 4, Oakland  
JUDGE: Ryu**

[REDACTED] and [REDACTED]  
[REDACTED]  
Plaintiffs,  
v.  
INTERSEC INTERACTIVE, INC., and  
DOES 1-25  
Defendants

I

INTRODUCTION

Defendant INTERSEC INTERACTIVE INC., a New York Corporation addresses a number of inaccurate facts and conclusions in additional declarations. Further, Defendant responds to the inaccurate portrayal that a Federal Court in New York cannot apply California law to those claims that may have arisen in California.

## .II

**ADDITIONAL FACTUAL BACKGROUND****Defendant Intersec Interactive, Inc.**

Defendant Intersec Interactive, Inc. (INTERSEC) has always and currently does maintain an office in New York. The upstate residence has served as an Intersec office since 2003 when it was purchased. Prior to 2011, the offices were at [REDACTED] in Brooklyn New York. In 2011, the office were at [REDACTED] New York, NY 10001. From 2012 until now, the office has been [REDACTED] in Astoria, New York.

Defendant's CEO [REDACTED]'s primary residence has always and is currently at this upstate New York location. The Emeryville apartment was a company apartment rented for the purpose of convenience as providing housing for performers. [REDACTED] was allowed to use that apartment in his capacity as owner. That apartment is no longer in use nor is it leased. The organizational chart attached to Plaintiff's declaration was not created by Intersec, its officers nor employees; rather, this chart was made by an unknown person, possibly Plaintiff [REDACTED]

**Plaintiff** [REDACTED]

Plaintiff [REDACTED]'s claims regarding unemployment are inaccurate. She is an erotic performer with the ability to perform at various adult entertainment companies at once. [REDACTED] first began her association with Defendant as an erotic performer in May of 2009. She was a resident of Oregon when she first began contracting with Defendant, and remained as such for some time after her contract began. She has done shoots for Meadhall (paintoy.com). [REDACTED] is currently associated with and does modeling for Digital Dark LLC which is Plaintiff [REDACTED]'s corporation. The digitaldark.org web site is a direct competitor of Defendant Intersec.

[REDACTED] signed the Independent Contractor Agreement provided by Defendant under her own free will and made no statements with respect to any negotiation. No evidence of coercion or additional pressure has been introduced. When she was asked if she accepted it, she made no protests; thus, there is no evidence of coercion or force, rather [REDACTED] executed the Agreement without any reservations or concerns.

During all periods when services were provided to Defendant, Plaintiff [REDACTED] was not

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR TO TRANSFER VENUE.

1 expected to be present at Defendant's office. She had an agreement with Defendant that she would  
2 work in the facilities as a courtesy for her. Plaintiff [REDACTED] set her own hours which were typically  
3 around five and a half hours per day. She was often not in the office for various reasons, had full  
4 control over her own schedule (including taking a month long trip to Germany in May of 2014, for  
5 which she did not request approval and for which required no approval was made by Intersec.)  
6 Plaintiff [REDACTED] was paid on a daily basis, not an hourly basis as Plaintiff suggests. All references to  
7 hourly reporting were only for accounting purposes (i.e, to show allocation of resources for various  
8 projects).

9 Plaintiff [REDACTED] was not assigned as Site Manager of the "TopGrl" site. She requested to be  
10 what Intersec called, the "Director" of the "TopGrl" site. She was in fact given a revenue share based  
11 on its sales as an additional motivational factor to encourage her to perform well. The tasks Plaintiff  
12 [REDACTED] was performing had natural due dates based on regular updating of Intersec's sites. These were  
13 communicated to [REDACTED] and she subsequently left to work on her own. The schedule that she  
14 suggested and then agreed upon was rarely adhered to. She was never penalized nor disciplined for a  
15 lack of timeliness or for coming to the office later than she had previously stated.

16 The office was provided as a convenience for [REDACTED]. She chose when she would come in and  
17 when she would leave. The laptop she was provided, which she still has, was loaned to her, at her  
18 request, as an accommodation. In fact, she claimed on many occasions that her telephone was all she  
19 needed.

20 There was no termination of Plaintiffs. The statements made in the email were meant to  
21 transfer the functions of several Independent Contractors to Daniel Intraub. There were no acts of  
22 retaliation towards Plaintiff [REDACTED]. [REDACTED]'s recollection of the conversation at TUNA is completely  
23 skewed and is evidence of her pre-existing psychological issues. She is currently under the care of a  
24 therapist for these issues. During many conversations, [REDACTED] frequently explained her extreme social  
25 anxiety and her extremely judgmental nature to other workers.

26 **Plaintiff [REDACTED]**

27 Plaintiff [REDACTED] also performed services for a stint from November of 2009 until January  
28 of 2011. Plaintiff [REDACTED] discussed having assistance from his family on several occasions, and

1 often stated that he did not need to work to pay his bills. His mother also resides in the NYC/Tristate  
2 area at [REDACTED]

3 Plaintiff [REDACTED] was never paid an hourly wage. He insisted on being paid a bi-weekly rate,  
4 regardless of how many hours he worked. His invoices provided to Defendant never indicated hours.  
5 He also was contracted and paid through his separate business, The Digital Dark LLC.

### 6 III

### 7 LEGAL ANALYSIS

#### 8 A. VENUE

##### 9 1. New York Federal Court is proper venue.

10 Normally, a district court considering a §1404(a) motion must evaluate both the private interests  
11 of the parties and public-interest considerations. However, when the parties' contract contains a valid  
12 forum-selection clause, that clause "represents [their] agreement as to the most proper forum,"  
13 *Stewart*, 487 U.S., at 31, 108 S. Ct. 2239, 101 L. Ed. 2d 22, and should be "given controlling weight  
14 in all but the most exceptional cases," *id.*, at 33, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (494)

15 Plaintiff [REDACTED] and Defendant INTERSEC negotiated the provisions of said contract and agreed  
16 to the terms. From the outset, it was agreed that New York law would control any dispute that arose  
17 between the parties. This makes sense since the employees frequently travelled to New York and the  
18 corporation's activities were in New York. The proper venue of New York should come as no surprise  
19 to Plaintiff [REDACTED]

20 Here, Defendant has always maintained an office in New York. Activities occur in New York at  
21 the primary residence of [REDACTED]. The [REDACTED] declaration is telling. The corporation  
22 has always maintained an office in New York as well as having [REDACTED]'s residence as an additional  
23 office. Claims that all activities related to this case have occurred in Oakland, California are not true  
24 and should not form the basis of a decision regarding venue.

##### 25 2. The declarations support a New York Venue.

26 Declarations and affidavits should be considered, and in this case, support a New York venue.  
27 Unlike a motion to dismiss for failure to state a claim under Rule 12(b)(6), the pleadings need not be  
28 accepted as true and the Court may consider supplemental written materials and consider facts outside

of the pleadings. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004); *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996) (holding that "the pleadings are not accepted as true" and that "facts outside of the pleadings" may be considered in a 12(b)(3) motion); *Walker v. Carnival Cruise Lines*, 107 F.Supp.2d 1135, 1137 n.2 (N.D. Cal. 2000) (noting that in resolving previous 12(b)(3) motion, "the Court did not assume the truth of the pleadings and considered facts not contained therein."). Accordingly, "venue issues [ordinarily] are resolved on affidavits and declarations." Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial P 4:254 at 4-70 (The Rutter Group 2004); e.g., *Murphy*, 362 F.3d at 1140-43 (deciding venue issue through allegations made in affidavits/declarations).

If genuine contested factual issues are presented, the court is obligated to draw all reasonable inferences and resolve the factual conflicts in favor of the non-moving party. *Murphy*, 362 F.3d at 1138-1140 (explaining in part that although "it was error not to accept *Murphy's* version of the facts, and all reasonable inferences thereon, we will examine whether *Murphy* presented sufficient evidence to survive *Schneider's* Rule 12(b)(3) motion under the standard we have announced").

Here, Plaintiffs' declarations clearly demonstrate a lack of veracity. As a matter of fact, they seem to amount to perjury. Plaintiffs claim unemployment and hardship, but their work in the public eye, in BDSM scenes and websites, show a different lifestyle and lack of veracity on their part. Plaintiffs are clearly working and able to participate in litigation. One Plaintiff, [REDACTED] doesn't even reside in California, but instead resides in Oregon. Even Plaintiff [REDACTED]'s claims regarding Daniel Intraub occurred in New York. These additional facts and documents provided in the supplemental declarations support Defendant's motion for the dismissal or transfer of venue to New York.

### **3. Dismissal of the complaint is proper.**

Where venue is improper, the District Court has the discretion to dismiss the case under Rule 12(b)(3) or transfer the case in the interests of justice to an appropriate jurisdiction under 28 U.S.C. § 1406(a). See *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992); *Kawamoto v. CB Richard Ellis, Inc.*, 225 F.Supp.2d 1209, 1212 (D. Haw. 2002). In determining whether to transfer or dismiss a case, the court may consider: the applicable statute of limitations, the relative injustice imposed on the parties, whether the suit was filed in bad faith or for harassment, whether the plaintiff has requested or shown

an interest in a transfer; and, whether the chosen venue was clearly or obviously improper. See *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1201-02 (4th Cir. 1993); *King*, 963 F.2d at 1304-05; *Johnson v. Payless Drug Stores Northwest, Inc.*, 950 F.2d 586, 588 (9th Cir. 1992); *Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1523 (9th Cir. 1983). "A determination of improper venue does not go to the merits of the case and therefore must be without prejudice." See *In re Hall, Bayoutree Assoc., Ltd.*, 939 F.2d 802, 804 (9th Cir. 1991); Schwarzer, Tashima, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial P 9:145.1 at 9-40. Here, dismissal will be an effective remedy since the claims should have been brought in New York. There is no reason for a California court to waste time in the litigation of this case.

#### **B. PLAINTIFF'S CLAIMS OF "INCONVENIENCE" ARE OVERSTATED.**

New York Federal Court is the more convenient forum. The underlying claims are related to activities that occurred in New York. The corporation is a New York corporation with offices and records in New York.

28 U.S.C. §1404 provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

See also *Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.* 820 F. Supp.503, 506 (C.D. Cal. 1992) The purpose of section 1404(a) "...is to prevent the waste of 'time, energy, and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack* (1964) 376 US 612, 616 (quoting *Continental Rain Co. v. Barge FBL-585* 364 U.S. 19 (1960)). The United States District Court for the Southern District of New York, is a district where the action might have been brought since Defendant INTERSEC is a New York corporation, operates its business in New York and the contract specifically provides for that forum.

Plaintiff [REDACTED] resides in Oregon. There will really be no difference for him if the case is litigated in New York versus California. Expense to Plaintiff's is overstated in their declarations. They have decided to bring this case, and whether or not they have the resources is not relevant.

#### **C. FEDERAL COURT IN NEW YORK CAN APPLY BOTH NEW YORK AND CALIFORNIA LAW.**

1 The law to be applied in the federal courts varies depending on the nature of the particular case  
2 and of the specific issues in the case. There are three general categories into which that law may be  
3 subdivided: (1) state law operative of its own force, (2) state law incorporated or adopted into federal  
4 law as the federal rule of decision, and (3) federal law uniform throughout the nation. The selection  
5 of the appropriate law depends on the circumstances of each case, not on the nature of the court's  
6 jurisdiction or on other clear guidelines. For example, in the usual diversity jurisdiction case, state  
7 law will govern of its own force; the federal court sits, in effect, as another state court. *Southern*  
8 *Pacific Transp. Co. v. United States* (E.D.Cal. 1978) 462 F.Supp. 1193, 1198.

9 Plaintiff's claim that the New York Federal Court cannot possibly apply California state  
10 law. This is contrary to the regular work that federal courts undertake on a daily basis. The New  
11 York Federal Court can easily make a determination as to which alleged acts occurred in California  
12 and what occurred in New York. One must hope that an acting judge or magistrate can apply the  
13 applicable case law.

14 It is the source of the right, not the basis of federal jurisdiction, which determines the  
15 controlling law. *Van Gemert v. Boeing Co.*, 553 F.2d 812, 813 (2d Cir. 1977) Plaintiff's claims that  
16 a New York court would only apply New York laws is not supported by any case law offered in the  
17 Opposition. Here, the New York court can parse the claims and apply the proper legal standards for  
18 each act or wrong and each remedy or right.

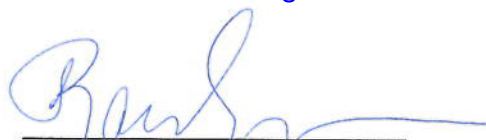
#### 19 IV

#### 20 CONCLUSION

21 For the aforementioned reasons, this Court should dismiss Plaintiffs complaint. In the  
22 alternative, Defendant INTERSEC prays that this action be transferred to the United States District  
23 Court, Southern District of New York.

24  
25  
26  
27 Respectfully submitted,  
28

1 Dated: May 22, 2015

2   
KAREN TYNAN  
Attorney for Defendant  
INTERSEC INTERACTIVE INC.

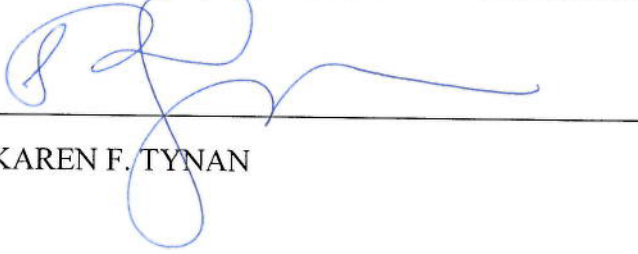


CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2015, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and service via transmittal of a Notice of Electronic Filing.

I declare under penalty of perjury under the laws of the United States of American that the foregoing is true and correct.

Executed on May 22, 2015 at Santa Rosa, California.



KAREN F. TYNAN